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No. 80-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner,

v.

TERREL BELL, *et al.*,
Respondents,

and

THE TRUMBULL BOARD OF EDUCATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF BIRCH BAYH, ROBERT DRINAN, DON EDWARDS, EDITH GREEN, PATSY MINK AND PATRICIA SCHROEDER

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Birch Bayh, Robert Drinan, Don Edwards, Edith Green, Patsy Mink and

Patricia Schroeder hereby respectfully move, pursuant to Rules 36 and 42 of this Court's Rules, to file the within brief amici curiae in North Haven Board of Education v. Bell, et al. in support of respondents. Counsel for petitioners have refused to consent to the filing of this brief.

Amici are present and former members of the United States Senate and the House of Representatives who share a long-standing concern for sex equity in education. In addition, Birch Bayh was the sponsor and floor manager of Title IX in the Senate and Edith Green was the sponsor and floor manager of Title IX in the House of Representatives.

Amici believe their brief will be of substantial assistance to the Court in the resolution of the issues presented by this case. The brief will focus on the intent

of the Congress in enacting Title IX and on the role of Title IX in the comprehensive system of federal remedies to combat sex discrimination in education.

Respectfully submitted,

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September 8, 1981.

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INTEREST OF AMICI CURIAE

The interest of amici curiae appears from the foregoing motion.

SUMMARY OF ARGUMENT

In Title IX of the Education Amendments of 1972, U.S.C. § 1681 et seq., Congress addressed comprehensively the problem of sex discrimination in education, broadly prohibiting discriminatory practices in educational programs and activities receiving financial assistance from the federal government. 20 U.S.C. 1681(a). Although certain types of institutions are exempted, 20 U.S.C. 1681(a)(3)-(7), Title IX recognizes no exceptions to the class of potential victims of discrimination who are protected under the statute. By its terms, Title IX's ban on sex discrimination is all-inclusive, extending to any "person" -- both employees as well as students -- who benefit from, or participate in, a federally-funded educational program or activity. Section 1681(a).

Title IX was patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., barring racial and national origin-based discrimination by recipients of federal funds. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). Conspicuously absent from Title IX, however, is any analogue to section 604 of Title VI, 42 U.S.C. § 2000d-3, which expressly excludes discriminatory employment practices from the scope of the 1964 statute. At issue in this case is whether, despite the absence of such a provision in Title IX, a Title VI-like employment exclusion should nonetheless be read into Title IX. The Court of Appeals correctly held that such an exclusion for employment practices was not implicit in Title IX, and that the Department of Education's regulations promulgated under Title IX, 34 C.F.R. Part 106, Subpart E, are therefore valid. 629 F.2d 773.

We submit this brief to make essentially two points. First, Title IX's application to discrimination in employment is a necessary part of a comprehensive federal scheme to forbid sex discrimination in education. Sections 1681 and 1682 are not merely duplicative of remedies available under other statutes. The fund termination remedy of Title IX, section 1682, is essential to effectuate the purposes of the statute, and to provide an economic disincentive to discriminatory employment practices potentially more potent than the "make whole" compensatory remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Equal Pay Act, 29 U.S.C. § 206(d). Further, Title IX's coverage of employment is necessary to extend to educational employees the same degree of protection, and the same enforcement mechanisms, that are enjoyed by other sim-

ilarly situated workers under different federal statutes and programs.

Second, the legislative history demonstrates that Congress intended employment practices, as well as admissions and scholarship aid, to come within the scope of Title IX. Senator Bayh, the sponsor of Title IX, stated repeatedly during the debates immediately preceding Senate passage of the Act that Title IX was meant to cover employment. A close reading of these statements makes clear that they referred to sections 901 and 902, 20 U.S.C. 1681 and 1682, and not merely to other portions of the legislation revising Title VII and the Equal Pay Act. Indeed, one year earlier Senator Bayh had introduced a predecessor to Title IX that was also intended to reach employment discrimination, and yet did not contain any of the provisions of the 1972 statute expanding other remedies for employment discrim-

ination. Moreover, the omission from Title IX of Title VI's express exclusion for employment practices was not an oversight or mistake, but reflected a deliberate decision on the part of Congress to include employment in Title IX, as evidenced by the action of the Conference Committee in resolving differences between the Senate and House versions of Title IX. Finally, the Department of Health, Education and Welfare's contemporaneous interpretation of Title IX and subsequent proceedings in Congress offer further evidence that employees were meant to be within the class of persons protected under the 1972 statute.

ARGUMENT

I. TITLE IX'S COVERAGE OF EMPLOYMENT IS AN ESSENTIAL PART OF THE COMPREHENSIVE SYSTEM OF FEDERAL REMEDIES TO COMBAT SEX DISCRIMINATION IN EDUCATION

It has been suggested that Title IX's application to discrimination in employ-

ment is a question of "largely academic interest" in view of amendments to Title VII and the Equal Pay Act to extend certain of those statutes' protections to teachers and other educational employees.1/ Islesboro School Committee v. Califano, 593 F.2d 424, 430 (1st Cir.), cert. denied, 444 U.S. 972 (1979). See also Romeo Community Schools v. H.E.W., 600 F.2d 581, 584 (6th Cir. 1978), cert. denied, 444 U.S. 972 (1979). This is simply incorrect. The protection of employees under Title IX is necessary to effectuate the purposes of the statute and to

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1/ Title VII was amended in 1972 to include coverage of educational activities of educational institutions, 42 U.S.C. 2000e-1, and to remove an exemption for public employers, including public schools, 42 U.S.C. § 2000e(a). Section 13(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a), was amended to make the Equal Pay Act, 29 U.S.C. § 206(d), applicable to professional employees, including teachers and educational administrative personnel.

provide full and effective enforcement of the federal ban on employment discrimination in education.

As this Court stated in Cannon v. University of Chicago, supra, 441 U.S. at 704, one of Congress' principal purposes in enacting Title IX was "to avoid the use of federal resources to support discriminatory practices." That purpose would be seriously frustrated if, as petitioners urge, the employment exclusion of Title VI is engrafted onto Title IX. Because Title IX is the only statute dealing with sex discrimination that provides comprehensively for termination of federal funding to educational institutions,[2/] acceptance of petitioners' argument would oblige the federal government to assist

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2/ Neither Title VII nor the Equal Pay Act provide authority for the termination of federal funding.

even those institutions engaging in the most blatant discriminatory employment practices. This enforced subsidy, in the face of a flouting of federal law, is just the sort of investment in discrimination that Congress meant to avoid.

Moreover, Title IX's procedure for the termination of federal financial support is a crucial part of the system of federal remedies set up to combat discriminatory practices and policies in education. 629 F.2d at 785. Termination of federal funds is, of course, a "severe" sanction, Cannon v. University of Chicago, supra, 441 U.S. at 704-05 & n. 38, but therein lies its potency as a deterrent to sex-based discrimination. See generally Justice Delayed and Denied: H.E.W. and Northern School Desegregation, Center for National Policy Review (1974). Even if funding cut-offs are rarely effected in

practice, the very threat of such action -- given the pervasiveness of federal assistance in this area -- can create economic disincentives to discrimination that are more powerful than the "make whole" reinstatement and back pay remedies generally available under other anti-discrimination statutes. See Statement of the U.S. Commission on Civil Rights on Department of Education Appropriations Bill, Before the House Subcommittee on Labor, Health, Education and Welfare of the Committee on Appropriations (April 1, 1980).

Title IX thus does not merely duplicate remedies under Title VII and the Equal Pay Act. Title IX's fund termination authority complements, and adds significantly to, those protections as part of a comprehensive scheme for the enforcement of the federal prohibition on discrimination in education. It is one thing

for an educational institution to engage in sex-based discrimination secure in the knowledge that federal funding will continue anyway; quite another to discriminate at the risk of losing federal aid entirely. Thus, while the Title VII and Equal Pay Act remedies serve largely to compensate persons for past acts of discrimination, Title IX's fund termination remedy operates prospectively, providing an important deterrent by raising the potential costs of discriminatory practices to prohibitive and politically unacceptable levels.

Title IX's coverage of employment is also necessary simply to extend to most educational employees the same protections against discrimination that are provided to other employees under different statutes and programs. Because they are typically public sector employees, teachers and other educational workers may not look

to the Equal Employment Opportunity Commission (EEOC) for assistance in prosecuting a meritorious Title VII claim. The EEOC may attempt to conciliate a complaint brought by a public school employee, but its court enforcement powers are limited to employees in the private sector. See 42 U.S.C. 2000e-5(f).3/ Thus, absent coverage of employment under Title IX, there exists no effective mechanism for direct federal involvement in educational discrimination cases involving public schools, and individual employees will be forced to bear the full cost of expensive and protracted litigation.

Similarly, most educational employees are not subject to the protections of

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3/ The EEOC may refer such cases to the Justice Department. However, the resources of the Justice Department's Civil Rights Division section for fair employment litigation are far less extensive than those available to the EEOC for this purpose.

Executive Order 11246, which prohibits employment discrimination by recipients of federal contracts and, like Title IX and Title VI, is enforced through termination of federal funds. See 41 C.F.R. § 60-1 et seq. The Executive Order does not reach most educational employees because the bulk of federal aid to education -- particularly at the elementary and secondary school levels, where most educational workers are employed -- flows to educational institutions in the form of grants and loans, rather than "contracts," within the meaning of the Executive Order. Thus, exclusion of employment under Title IX would serve to deprive most educational employees of a federal fund termination remedy that is already made available to employees of most major corporations through the Executive Order program.

The existence of multiple remedies dealing with the problem of employment

discrimination in education hardly renders Title IX's coverage of employees redundant or duplicative. Title IX serves additional purposes, and provides additional protections, as Congress was aware in 1972 when it enacted Title IX. In any event, to argue that the existence of other remedies shows a Congressional intent to exclude employment from Title IX is to turn on its head the ordinary presumption that Congress approaches the problem of discrimination from several directions, applying multiple and occasionally overlapping remedies. Alexander v. Gardner-Denver, 415 U.S. 36, 47-49 (1974). See also International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, 429 U.S. 229 (1976). In the area of education, Congress determined that private rights of action were not enough to undo the persistent pattern of employment discrimination on the basis of sex.

Accordingly, Congress sought to provide the additional enforcement mechanisms -- including specifically the fund termination authority -- of Title IX.

II. THE LEGISLATIVE HISTORY MAKES CLEAR THAT TITLE IX WAS MEANT TO COVER EMPLOYMENT PRACTICES, AS WELL AS DISCRIMINATION IN SCHOLARSHIPS, ADMISSIONS AND OTHER AREAS MORE DIRECTLY AFFECTING STUDENTS

The legislative history leaves little room for doubt that Congress intended Title IX to forbid sex discrimination against employees of educational institutions receiving federal funds. As we show below, there is no evidence in the pertinent legislative materials that Congress intended the unqualified language of Title IX to be given anything other than its plain meaning -- to prohibit the exclusion, on grounds of sex, of any "person" from "participation in" and "the benefits of" federally-assisted programs and activities. Section 1681(a). On the

contrary, mindful of the employment exclusion in Title VI, Congress chose not to include a similar provision in Title IX but, rather, to extend Title IX's protections to employees as well as students.

A. Proceedings in the Senate.

Title IX as finally enacted was an amendment (Amendment No. 874) sponsored by Senator Bayh to the Higher Education Amendments of 1972, S.659, 92d Cong., 2d Sess. (1972). What is now Title IX comprised the first four sections of the Bayh Amendment, sections 1001-1004. See 118 Cong. Rec. 5803 (1972). Additional sections consisted of provisions amending, inter alia, Title VII of the Civil Rights Act of 1964 and the Equal Pay Act to make those statutes generally applicable to discrimination against public and professional employees, including teachers.

Sections 1005-1010. Ibid.4/

The views of the sponsor of legislation are entitled to considerable weight in construing Congressional intent. Simpson v. United States, 435 U.S. 6 (1978). In the case of Title IX, Senator Bayh made clear that employment discrimination in education was one of the principal concerns of his amendment and, more particularly, of sections 1001-1004 of the amendment -- the provisions corresponding to what is now Title IX. In introducing the legislation, Senator Bayh stressed the need for effective remedies to combat sex discrimination in hiring and promotion. Senator Bayh deplored the "double stan-

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4/ The provisions of the Bayh amendment revising Title VII, although passed as part of Title IX, were ultimately deleted during codification because the same revisions to Title VII had been enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 42 U.S.C. 2000e-1. The 1972 amendments to the Equal Pay Act, see note 1, infra, were enacted as part of Title IX.

dard" of educational institutions refusing to hire women on whom they have conferred degrees. 118 Cong. Rec. 5804. "In spite of high academic standards, a woman who has met the rigorous standards for a Ph.D. program may suddenly find that these same schools do not have sufficient confidence in their own standards to hire the graduate to teach." 118 Cong. Rec. 5804-05.

Senator Bayh also observed that women are discriminated against in promotion and pay, even if they are initially successful in obtaining jobs in the education field. "[T]he rule is that once hired, women do not receive promotion as often as men... [and] those women who are promoted...do not receive equal pay for equal work." 118 Cong. Rec. 5805 (1972). Finally, Senator Bayh explained that his amendment was directed to discrimination against administrative personnel, as well as teachers. Citing statistics on the under-

representation of women among elementary and high school principals, Senator Bayh stated that "preference for men over women to fill administrative posts is...clear." Ibid.

Petitioners do not dispute that at least some portions of the Bayh amendment were intended to reach teachers and other educational employees. However, they contend that Senator Bayh's statements concerning the legislation's coverage of employment -- as contrasted to his statements concerning discrimination in school admissions and scholarships -- do not relate to the first part of his amendment, sections 1001-1004, but instead relate only to subsequent sections revising Title VII and the Equal Pay Act. This strained interpretation of the sponsor's remarks is simply incorrect, and was properly rejected by the Court of Appeals.

Senator Bayh's intentions were made clear at the outset of the Senate debates. In introducing his proposed amendment, he stated that sex discrimination was a problem that reached "into all facets of education," specifically including "admissions, scholarship programs, faculty hiring and promotion, professional staffing and pay scales." 118 Cong. Rec. 5803 (1972) (emphasis added). He then summed up the provisions of his amendment as follows:

> [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions -- and appropriate safeguards parallel to those found in Title VI of the 1964 Civil Rights Act. Other important provisions in the amendment would extend the equal employment opportunities provisions of Title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Work Act to include executive, administrative and professional women. 118 Cong. Rec. 5803 (1972) (emphasis added).

Senator Bayh thus explicitly stated that the "heart of this amendment," the first four sections consisting of Title IX, was intended to cover "faculty employment," as well as discrimination more specifically directed to students. That Senator Bayh was speaking of Title IX in the first part of the quoted passage is made clear by his statements concerning Title IX's "limited exceptions" for specified classes of educational institutions, the similarity of his proposal to Title VI, and the applicability of the provisions to schools "receiving Federal funds." The amendments to Title VII and the Equal Pay Act were discussed separately as "other important provisions in the amendment," a reference to sections 1005 to 1010. The phrase "other important provisions" would make no sense if Senator Bayh's earlier statement concerning the

amendment's coverage of employment discrimination is viewed as referring to the proposed changes in Title VII and the Equal Pay Act.

Title IX's intended application to employment practices was again underscored in a comprehensive summary of the amendment read by Senator Bayh during the Senate debates. 118 Cong. Rec. 5806-08 (1972). For purposes of his analysis, Senator Bayh divided the amendment into four sections -- the first dealing with the Title IX provisions, the second dealing with the amendments to Title VII and the Equal Pay Act, the third dealing with provisions of the amendment authorizing federal studies of sex discrimination in education, and the fourth dealing with amendments to allow participation by the Attorney General in certain sex discrimination suits. Although the headings alone of these sections may suggest a con-

trary inference,5/ the substance of Senator Bayh's comments make clear that discrimination in employment was to be dealt with by both the Title IX provisions and the sections amending Title VII and the Equal Pay Act. In discussing the Title IX provisions, Senator Bayh described the provisions' scope both with respect to the types of institutions covered -- including a discussion of Title IX's express exemptions -- and with respect to the types of discrimination covered. In this latter regard, Senator Bayh's remarks confirm Title IX's application to employment. Senator Bayh stated:

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned --

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5/ The heading for the first section of the summary was "Prohibition of Sex Discrimination in Federally Funded Education Programs." The heading for the second section, dealing exclusively with employment discrimination, was "Prohibition of Education-Related Employment Discrimination." 118 Cong. Rec. 5807 (1972).

> employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institutions such as vocational classes, and so forth. The provisions have been tested under Title VI of the 1964 Civil rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility. 118 Cong. Rec. 5807 (1972) (emphasis added).

Petitioners' position also cannot be squared with Senator Bayh's statements in response to questions raised by other senators during the debate on the Senate floor. Senator Pell, inquiring about the Title IX provisions, asked whether the Bayh amendment would forbid discrimination in employment at certain private schools, which were otherwise exempted from the Title IX provisions in their admissions policies. 118 Cong. Rec. 5812-13 (1972). Senator Bayh answered that his amendment would generally prohibit all employment discrimination in education, including discrimination by private schools permitted under the amendment to continue their

single-sex admissions policies. However, he added that certain institutions -- specifically parochial schools and military academies -- were exempted in all respects from the provisions of Title IX, and therefore were not required to make any changes in their employment practices.

In relevant part, the exchange between Senators Bayh and Pell was as follows:

> MR. PELL. . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to non-public institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an

institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

In the area of employment, we permit no exceptions. In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.

* * * *

MR. PELL. . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

* * * *

MR. PELL. Would this apply to a parochial school where they have nuns as teachers?

MR. BAYH. No. There is an explicit exception for educational institutions controlled by a religious organization.

* * * *

> MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have women teachers?
>
> * * * *
>
> MR. BAYH. All military schools are excluded.

These statements by Senator Bayh, the sponsor of Title IX, made immediately before Senate passage of his amendment, simply cannot be dismissed as an imprecise "digression," as petitioners contend. There is no mistaking that Senator Bayh's remarks refer to Title IX -- he is discussing the scope of exemptions that were not part of the amendments to Title VII and the Equal Pay Act. Similarly, there is no mistaking that he is stating that Title IX applies to employment. As the Court of Appeals noted, 629 F.2d at 782, Senator Bayh's discussion of the exemptions in Title IX cannot be interpreted in any other way. The statement that the employment practices of certain institutions are

exempt from Title IX obviously makes no sense unless employment practices in general are covered under the statute. Ibid.6/

Finally, Senator Bayh's previous legislative efforts confirm that his intention to prohibit employment discrimination was not confined to the sections of his amendment revising Title VII and the

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6/ Moreover, Senator Bayh reaffirmed these statements several months later by publishing in the Congressional Record an analysis of Title IX prepared by Bernice Sandler of the Association of American Colleges. Discussing differences between Title IX and Title VI, the analysis stated:

> [T]he Higher Education Act differs from Title VI in that the sex discrimination prohibition is limited to federally assisted education programs and activities, whereas the race, color and national origin discrimination prohibitions are applicable to all federally assisted programs. Title VI also specifically excludes employment from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs. 118 Cong. Rec. 24684 n. 1 (1972) (emphasis added).

Equal Pay Act. In 1971 Senator Bayh sought unsuccessfully to amend a higher education bill with a provision similar to Title IX.7/ The 1971 proposal contained provisions identical to sections 901 and 902 of Title IX, 20 U.S.C. 1681 and 1682, barring sex discrimination in educational institutions receiving federal financial assistance, and authorizing the termination of such assistance. 117 Cong. Rec. 30156 (1971). The proposal also contained additional provisions permitting intervention by the Justice Department in certain sex discrimination suits, and authorizing a study on sex discrimination in higher education. 117 Cong. Rec. 30156-57 (1971). Significantly, however, the 1971 amendment did not contain provi-

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7/ The provision, Amendment No. 398 to S.659, was not voted on by the Senate because it was ruled "nongermane." 117 Cong. Rec. 30412 (1971).

sions paralleling the sections in the 1972 amendment revising Title VII and the Equal Pay Act to make those statutes generally applicable to educational employees.

If petitioners were correct that Title IX applies to employment discrimination only through its amendments to Title VII and the Equal Pay Act, then employment discrimination should have been clearly beyond the scope of Senator Bayh's 1971 proposed amendment, which did not contain provisions affecting these other statutes. On the contrary, however, the 1971 proposal was unquestionably meant to cover discrimination in employment, as well as discrimination in admissions and scholarships.

In describing the problem to which his amendment was directed, Senator Bayh stated that "While over 50 percent of our population is female, there is no effective protection for them as they seek admission and employment in educational

facilities." 117 Cong. Rec. 30155 (1971). After discussing discrimination in admissions, Senator Bayh stated, "Today, women seeking employment in higher education face an array of obstacles almost as insuperable as those which use to face blacks." 117 Cong. Rec. 30156 (1971). Senator Bayh concluded: "[J]ust as in other professions an old axiom applies, the higher the rank, the fewer the women." Ibid.

In sum, Senator Bayh's repeated statements on the Senate floor reflect a clear and unmistakable understanding that employment practices of federally-funded educational institutions were meant to be within the scope of Title IX.

B. Proceedings in the House of Representatives and the Action of the Conference Committee.

The version of Title IX that was passed by the House of Representatives was part of amendments to the Higher Education

Act of 1965, H.R. 7248, and was considered simultaneously with the Senate's passage of Title IX. The House bill was substantially similar to the Bayh amendment passed by the Senate. For present purposes, however, there was one key difference between the two bills -- the House version did contain a counterpart to section 604 of Title VI, expressly excluding employment from the coverage of Title IX. In the Conference Committee, however, this exclusion provision was dropped in favor of the Senate version of Title IX. The report of the Conference Committee explained the deletion as follows:

> [T]he House amendment, but not the Senate amendment, provided that nothing in the Title authorizes action by any department or agency with respect to an employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes. H.R. Rep. No. 92-1085, 92d Cong. 2d Sess. 221 (1972) (emphasis added).

The decision of the Conference Committee demonstrates that the omission from Title IX of a Title VI-like exclusion for employment practices was not an oversight or mistake, but rather reflected a deliberate decision to include authority for federal fund termination as one of the remedies for employment discrimination in education. The Senate and the House had disagreed over the inclusion of this remedy, and the position of the Senate prevailed in the Conference Committee through deletion of the employment provision in the House bill. Petitioners are simply asking this Court to reverse the resolution of the issue that was reached in the Conference Committee and ratified by the full Congress.

Two arguments are advanced in an attempt to show that the Conference committee action should not be accorded any weight in interpreting Title IX. The

first is that the employment exclusion had to be deleted since it was "inconsistent" with the other provisions of Title IX revising Title VII and the Equal Pay Act. See Islesboro School Committee v. Califano, supra, 593 F.2d at 428; Romeo Community Schools v. H.E.W., supra, 600 F.2d at 584. As the Court of Appeals correctly noted, however, any inconsistency between the exclusion provision and the later sections of the statute could have been easily cured by the addition of qualifying language limiting the effect of the exclusion section to section 901 of Title IX. 629 F.2d at 783. It is hardly reasonable to assume that Congress deleted a provision whose substance it intended to retain simply to avoid a drafting "mistake" that could have been corrected by substitution of the words "section 901" for "title" at the begining of the exclusion provision. At the very least, one

would expect some indication in the legislative history that this inclusion-by-omission was what the Conference Committee had in mind.

A second argument is that deletion of the employment exclusion should be accorded no weight because the exclusion provision itself was a redundancy. According to this position, Congress in enacting Title VI in 1964 viewed section 604 of that statute as merely confirming an exclusion of employment that would have been effective even in the absence of the express provision. Thus, an employment exclusion in Title IX was unnecessary to carry forward to that statute Title VI's implicit exclusion.8/ This argument,

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8/ The argument derives from a statement by Senator Humphrey, during the debate on Title VI, that section 604 "made a number of points clearer and more specific" and that the sponsors had thereby "expressed in specific legislative language what had always been intended." 110 Cong. Rec. 12707 (1964).

however, is also without merit. Whatever may have been Congress' implicit understanding in 1964 with respect to the coverage of Title VI, that understanding cannot be imputed to a different Congress with respect to a different statute eight years later. Even assuming that section 604 was unnecessary to effect exclusion of employment from Title VI, in 1972 that express exclusion was operative and had to be addressed by Congress in any new legislation patterned on Title VI.9/ In enacting Title IX, Congress did address

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9/ In this connection we note that Congress has in other statutes enacted nondiscrimination provisions similar to section 601 of Title VI. In some cases these statutes contain the employment exclusion of section 604, see, e.g., the Age Discrimination Act of 1975. 42 U.S.C. 6103 (c)(1), and in other cases the employment exclusion has been omitted, see, e.g., section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, section 612 of the Comprehensive Employment and Training Programs Act of 1973, 29 U.S.C. 991. The alternate retention and omission of the exclusion section confirms that Congress does not regard such provisions as implicit in all statutes modeled on Title VI.

the Title VI exclusion for employment, ultimately deciding to remove it from the 1972 legislation. Congress thus deliberately extended the remedies of Title IX to discrimination in employment.

C. Subsequent Developments.

Developments subsequent to the enactment of Title IX also confirm the Congressional understanding that the statute was meant to cover discriminatory employment practices.

On June 20, 1974 the Department of Health, Education and Welfare issued its notice of proposed rulemaking for the Title IX regulations, 30 Fed. Reg. 22228 (1974), setting forth, inter alia, the employment discrimination regulations which now appear as subpart E of the Department of Education's regulations, 34 C.F.R. 106.51 et seq. Whatever may be the views of the Secretary of Education

today,10/ these proposed regulations covering employment are entitled to deference as reflecting the contemporaneous interpretation of Title IX by the executive branch agency charged with responsibility for administering the statute. See Zuber v. Allen, 396 U.S. 168, 192-93 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Development Co. v. Int'l Union of Electrical Workers, 367 U.S. 396, 408 (1961). Significantly, the proposed regulations, although highly controversial in other respects, were never questioned for their asserted coverage of employment practices. Of the nearly 10,000 comments received by HEW during the notice and com-

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10/ Amici understand that the Department of Education is now considering revising the Title IX regulations to conform with petitioners' views. Even if the Department proceeds with such a revision, it is apparent that such an administrative after-thought would say little about the original meaning of Title IX.

ment period, 40 Fed. Reg. 24128 (1975), not one doubted that the agency was required by Title IX to issue regulations protecting employees as participants in, or beneficiaries of, federally-assisted educational programs. See Hearings Before the Subcommittee on Post-Secondary Education of the Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess. 479 (1975). It is also significant that the Title IX regulations were proposed and adopted by an administration not noted for its efforts to expand the authority of federal agencies beyond requirements set Congress. The Secretary of HEW at the time the Title IX regulations were adopted was Caspar W. Weinberger. The Commissioner of Education was Terrel Bell, the current Secretary of the Department of Education.

Moreover, subsequent to the adoption of the Title IX regulations, Congress repeatedly turned a deaf ear to legislative proposals that would have specifically disapproved of HEW's interpretation of Title IX. In 1975 Congress examined the Title IX regulations under a statutory review procedure which at that time provided that new regulations would become effective 45 days after transmittal unless the Congress, by concurrent resolution, found that the regulation was inconsistent with the statute on which it was based. 20 U.S.C. 1232(d)(1)(Supp. IV 1974). In the Senate, Senator Helms introduced such a resolution, calling for disapproval of all of the Title IX regulations, including subpart E. 121 Cong. Rec. 17301 (1975). In the House, Representatives Quie and Erlenborn introduced a related proposal, specifically disapproving of the employment sections of the Title IX regulations

as inconsistent with Title IX. 629 F.2d at 783. Significantly, neither of these measures was ever reported out of the committees to which they were referred.11/

11/ Then-Secretary Weinberger testified on behalf of HEW in Support of the Title IX regulations. The Secretary stated that he regarded Title IX as unequivocal in its directive to HEW to issue regulations covering employment discrimination. The Secretary observed that Title IX provides that:

> 'No person shall be discriminated against, in, or be excluded from or denied participation in a federally assisted education program or activity on the basis of sex.' I don't see any way you can find that employees do not participate in education programs and activities receiving Federal assistance, and, therefore, they are within the protected class. I don't see any reason for excluding employment under 901. If the Congress wants to exclude employment, it is the simplest thing in the world, but when you say 'no person,' there is no room for us to argue any other intent.

Hearings Before the Subcommittee on Post-Secondary Education of the Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess., 478 (1975).

Subsequent efforts in Congress to narrow the scope of Title IX fared no better. In 1975 Senator Helms introduced a bill, S.2146, to reinsert into Title IX an employment exclusion similar to the provision that was deleted by the Conference Committee in 1972 from the House version of Title IX. Senator Helms' proposal, however, was not adopted. In 1976 Senator McClure introduced a similar amendment that would have confined Title IX to the "curriculum or graduation requirements" of educational institutions receiving federal financial assistance. 122 Cong. Rec. 28136 (1976). Again, however, Congress took no action.

We recognize, of course, that the failure of Congress to expressly disapprove of an agency's interpretation of a statute does not invariably mean that Congress has approved of that interpretation. See Islesboro School Committee v.

Califano, supra, 593 F.2d at 428 n.3.12/ Nonetheless, we submit that the pattern of Congressional inaction here -- in the face of specific legislative proposals to disapprove of the agency's regulations and to exclude employment from Title IX -- is not without significance. In Cannon v. University of Chicago, supra, the Court found that the "absence of legislative action" to alter the persistent "assumption" that Title IX provided a private right of action was evidence of Congressional acquiescence in that assumption. 441 U.S. at 702-03. See also Sibbach v. Wilson & Co., 312 U.S. 1, 14-16 (1941). We think that Congress' inaction is no less meaningful here.

12/ In 1975, after Congress' review of the Title IX regulations pursuant to the Congressional review statute, Congress amended that statute to provide that failure to adopt a concurrent resolution disapproving agency regulations should not be interpreted as approval of such regulations. Pub. L. 94-142 § 7(a)(1), 20 U.S.C. § 1232(d)(1).

CONCLUSION

For the foregoing reasons, amici submit that the decision of the Court of Appeals below should be affirmed.

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